

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MERCEDES BYRD,

Plaintiff,

VS.

Case No.: 2:13-cv-01864-GMN-CWH

## ORDER

AMERICAN HOME MORTGAGE  
SERVICING INC., OPTION ONE  
MORTGAGE LOAN TRUST, WELLS  
FARGO, N.A. TRS c/o OCWEN LOAN  
SERVICING, CHRIS ANDERSON, ALLAN  
BANASZEWSKI, DOES I-X, inclusive, and  
ROE CORPORATIONS I-X, inclusive.

Defendants.

Currently before the Court is a civil action filed by Mercedes Byrd (“Plaintiff”) against Defendants Homeward Residential, Inc. f/k/a American Home Mortgage Servicing, Inc. (“American Home”), Wells Fargo Bank, N.A. (“Wells Fargo”), and Ocwen Loan Servicing (“Ocwen”) (collectively “Defendants”) (ECF No. 1.) After filing her Complaint, Plaintiff also filed a Motion for Preliminary Injunction (ECF No. 6) and a Motion for Hearing Regarding Preliminary Injunction (ECF No. 8.) Defendants subsequently filed a Motion to Dismiss Plaintiff’s Complaint (ECF No. 11.) Plaintiff has filed a Response to Defendants’ Motion to Dismiss (ECF No. 14) and Defendants have filed a Reply in Support of their Motion to Dismiss (ECF No. 15.)

For the following reasons, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 11.)

## I. BACKGROUND

On January 10, 2002, Plaintiff purchased of some property, located at 3670 Happy

1 Lane, Las Vegas, Nevada 89120, APN# 178-06-101-026 (the "Property"). (Sale Deed, ECF No.  
2 13-1.)<sup>1</sup> On April 22, 2005, Plaintiff recorded a Deed of Trust and Note for \$805,000.00,  
3 naming Option One Mortgage Corporation as the beneficiary and Premier Trust Deed Services,  
4 Inc. as the Trustee. (Deed of Trust, ECF No. 13-2.) On June 22, 2007, Option One Mortgage  
5 Corporation executed an Assignment of Deed of Trust, making Wells Fargo, as Trustee for  
6 Option One Mortgage Loan Trust 2005-4 Asset-Backed Certificates, Series 2005-4, the  
7 beneficiary of the Deed of Trust. (Assignment of Deed of Trust, ECF No. 13-4.) That same  
8 day, Wells Fargo executed a Substitution of Trustee, naming Quality Loan Service Corporation  
9 as the new trustee under the Deed. (First Substitution of Trustee, ECF No. 13-3.)

10 On June 2, 2008, a Loan Modification Agreement between Wells Fargo and Plaintiff  
11 was recorded against the Property, indicating that the amount payable under the Note on March  
12 1, 2008 was \$886,338.18. (Loan Modification Agreement, ECF No. 13-5.) On April 27, 2009,  
13 Wells Fargo executed a Substitution of Trustee, naming AHMSI Default Services, Inc. as the  
14 new trustee under the Deed. (Second Substitution of Trustee, ECF No. 13-6.)

15 Plaintiff does not deny in any of her pleadings that around September of 2010, she  
16 ceased making payments on her mortgage. (Notice of Default, ECF No. 13-7.) Subsequently,  
17 on December 7, 2010, Wells Fargo executed a Substitution of Trustee, naming Power Default  
18 Services, Inc. as the new trustee under the Deed. (Third Substitution of Trustee, ECF No. 13-8.)  
19 That same day, Power Default Services, Inc. recorded a Notice of Default and Election to Sell  
20 against the Property. (Notice of Default, ECF No. 13-7.)

21 On April 4, 2011, a Notice of Trustee's Sale was recorded against the Property, setting  
22 the sale for April 25, 2011. (4/4/11 Notice of Trustee's Sale, ECF No. 13-9.) In response, on  
23 April 12, 2011, Plaintiff filed a Complaint in state court, and later filed an Amended Complaint  
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25 <sup>1</sup> The Court takes judicial notice of Exhibits A-M of Defendants' Request for Judicial Notice, ECF No. 13. *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Each of these documents is publicly recorded in the Clark County Recorder's office.

1 on April 20, 2011. (Mot. to Dismiss 3:7-12, ECF No. 12.) Plaintiff's Amended Complaint was  
2 dismissed without prejudice following a hearing on October 3, 2011, and an Order of Dismissal  
3 was entered on October 4, 2011. (*Id.*)

4 On December 1, 2011, a second Notice of Trustee's Sale was recorded against the  
5 Property, setting the sale for December 21, 2011. (12/1/12 Notice of Trustee's Sale, ECF No.  
6 13-10.) On July 17, 2012, a third Notice of Trustee's Sale was recorded against the Property,  
7 setting the sale for August 8, 2012. (7/17/12 Notice of Trustee's Sale, ECF No. 13-11.) On  
8 February 4, 2013, a fourth Notice of Trustee's Sale was recorded against the Property, setting  
9 the sale for February 26, 2013. (2/4/13 Notice of Trustee's Sale, ECF No. 13-12.) On June 3,  
10 2013, a Trustee's Deed upon Sale was recorded, naming Wells Fargo, as Trustee for Option  
11 One Mortgage Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4, the owner of the  
12 Property with a purchase price in the amount of \$550,000.00. (Trustee's Deed upon Sale, ECF  
13 No. 13-13.)

14 On October 11, 2013, Plaintiff, appearing pro se, filed her Complaint in this Court.  
15 (Complaint, ECF No. 1.) In the Complaint, Plaintiff asserts claims for (1) fraudulent  
16 foreclosure, (2) fraudulent assignment, (3) notary fraud, (4) declaratory relief for the  
17 cancellation of instrument, (5) quiet title, (6) preliminary injunction and permanent injunction,  
18 and (7) breach of implied covenant of good faith and fair dealing. (*Id.* 5:9-9:16.) Plaintiff  
19 subsequently filed her Motion for Preliminary Injunction (ECF No. 6) and Motion for a  
20 Hearing (ECF No. 8), seeking an Order from this Court that Defendants return possession of  
21 the Property to Plaintiff. On December 4, Defendants filed their Motion to Dismiss (ECF No.  
22 11) under Rule 12(b)(6) for failure to state a claim.

## 23 **II. LEGAL STANDARD**

24 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
25 that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona*

1 *Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss  
2 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the  
3 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds  
4 on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering  
5 whether the complaint is sufficient to state a claim, the Court will take all material allegations  
6 as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v.*  
7 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

8 The Court, however, is not required to accept as true allegations that are merely  
9 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
10 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
11 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a  
12 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing  
13 *Twombly*, 550 U.S. at 555) (emphasis added).

14 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)  
15 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*  
16 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's  
17 complaint contain "a short and plain statement of the claim showing that the pleader is entitled  
18 to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because  
19 "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179  
20 (9th Cir.1996). Mindful of the fact that the Supreme Court has "instructed the federal courts to  
21 liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132,  
22 1137 (9th Cir. 1987), the Court will view Plaintiffs' pleadings with the appropriate degree of  
23 leniency.

24 "Generally, a district court may not consider any material beyond the pleadings in ruling  
25 on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the

1 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*  
2 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents  
3 whose contents are alleged in a complaint and whose authenticity no party questions, but which  
4 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)  
5 motion to dismiss” without converting the motion to dismiss into a motion for summary  
6 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of  
7 Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*  
8 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers  
9 materials outside of the pleadings, the motion to dismiss is converted into a motion for  
10 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th  
11 Cir. 2001).

### 12 **III. DISCUSSION**

#### 13 **A. Fraud (Claims 1-3)**

14 To state a claim for fraud, a plaintiff must allege three factors: (1) a false representation  
15 by the defendant that is made with either knowledge or belief that it is false or without  
16 sufficient foundation; (2) an intent to induce another’s reliance; and (3) damages that result  
17 from this reliance. *See Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007). A claim of “fraud or  
18 mistake” must be alleged “with particularity.” Fed. R. Civ. P. 9(b). A complaint alleging fraud  
19 or mistake must include allegations of the time, place, and specific content of the alleged false  
20 representations and the identities of the parties involved. *See Swartz v. KPMG LLP*, 476 F.3d  
21 756, 764 (9th Cir. 2007). Rule 9(b) does not allow a complaint to merely lump multiple  
22 defendants together but requires plaintiffs to differentiate their allegations when suing more  
23 than one defendant and inform each defendant separately of the allegations surrounding his  
24 alleged participation in the fraud.” *Id.*

Plaintiff's first three claims all relate to allegations that Defendants committed fraud by either improperly assigning the Deed of Trust to Wells Fargo after the closing date of the Option One Mortgage Loan Trust 2005-4 Asset-Backed Certificates, Series 2005-4 in violation of the Pooling and Servicing Agreement (PSA) or by "robo-notorizing" the various recorded documents. (Complaint 5:9-7:7, ECF No. 1.) Plaintiff, however, does not have standing to challenge the validity of the trust's securitization agreements. *Klohs v. Wells Fargo Bank, N.A.*, 901 F. Supp. 2d 1253, 1260 (D. Haw. 2012) ("[I]t is well-established that a third party lacks standing to raise a violation of a PSA.") (internal quotations omitted); *Viloria v. Premium Capital Funding LLC*, 2:12-CV-00406-KJD, 2012 WL 4361252, at \*3 (D. Nev. Sept. 20, 2012) ("Plaintiffs lack standing to challenge the assignments of the Note and Deed of Trust and lacks standing to enforce or assert claims arising under the trust purchase agreement or Pooling and Servicing Agreement ("PSA") surrounding the 'securitization' of the Note."); *Shkolnikov v. JPMorgan Chase Bank*, 12-03996 JCS, 2012 WL 6553988, at \*22 (N.D. Cal. Dec. 14, 2012) ("Plaintiffs do not have standing to challenge the 2009 Assignment because they were not parties to, or third party beneficiaries of, the PSA.").

Furthermore, Plaintiff's bare, conclusory allegations of "robo-signing"<sup>2</sup> are insufficient to bring a fraud claim. *See Bascos v. Fed. Home Loan Mortgage Corp.*, CV 11-3968-JFW JCX, 2011 WL 3157063, at \*6 (C.D. Cal. July 22, 2011). ("Rule 9(b) and *Twombly* require plaintiffs to set forth more than bare allegations of 'robo-signing' without any other factual support."). Plaintiff has failed to allege any facts beyond the conclusory allegation that the notaries for the various recorded documents were "robo-signers" or to show how having documents signed by an alleged "robo-signer" would render those documents fraudulent or void. *See In re Brown*,

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<sup>2</sup> A "robo-signer" is presumably an agent of a bank or loan company who signs thousands of foreclosure documents regularly without actually having personal knowledge of the veracity of the information contained in the documents. *See In re Marks*, BAP CC-12-1140-KIDH, 2012 WL 6554705, at \*9 (B.A.P. 9th Cir. Dec. 14, 2012)

1 BAP WW-12-1534-TAKUD, 2013 WL 6511979, at \*13 n.33 (B.A.P. 9th Cir. Dec. 12, 2013)  
2 (“[T]here is nothing deceptive about using an agent to execute a document.”); *In re Marks*,  
3 2012 WL 6554705, at \*9 (rejecting the idea that the use of an alleged “robo-signer” somehow  
4 renders a document fraudulent or void).

5 To the extent Plaintiff alleges some other kind of fraud in her Complaint, Plaintiff has  
6 failed to allege any specific fraudulent conduct or name which Defendants allegedly committed  
7 the fraud. Accordingly, Plaintiff’s fraud claims must be dismissed.

#### 8 **B. Injunctive Relief (Claims 4 & 6)**

9 Plaintiff’s claims for injunctive and declaratory relief are not recognized as causes of  
10 action in Nevada. Injunctive relief, declaratory relief, and rescission are remedies, not claims.  
11 Accordingly, these “causes of action” are dismissed.

#### 12 **C. Quiet Title (Claim 5)**

13 In Nevada, a quiet title action may be brought “by any person against another whom  
14 claims an estate or interest in real property, adverse to the person bringing the action, for the  
15 purpose of determining such adverse claim.” NRS 40.010. “In a quiet title action, the burden of  
16 proof rests with the plaintiff to prove good title in himself.” *Breliant v. Preferred Equities*  
17 *Corp.*, 918 P. 2d 314, 318 (Nev. 1996). “Additionally, an action to quiet title requires a  
18 plaintiff to allege that she has paid any debt owed on the property.” *Lalwani v. Wells Fargo*  
19 *Bank, N.A.*, No. 2:11-cv-00084-KJD-PAL, 2011 WL 4574388 at \*3 (D. Nev. Sep. 30, 2011)  
20 (citing *Ferguson v. Avelo Mortg., LLC*, No. B223447, 2011 WL 2139143 at \*2 (Cal. App. 2d  
21 June 1, 2011). Plaintiff has failed to allege that she is not in breach of the loan agreement.  
22 Accordingly, this cause of action is dismissed.

#### 23 **D. Breach of the Implied Covenant of Good Faith and Fair Dealing (Claim 7)**

24 To state a claim of breach of the covenant of good faith and fair dealing, Plaintiff must  
25 allege: (1) Plaintiff and Defendants were parties to an agreement; (2) Defendants owed a duty



1 of good faith to the Plaintiff; (3) Defendants breached that duty by performing in a manner that  
 2 was unfaithful to the purpose of the contract; and (4) Plaintiff's justified expectations were  
 3 denied. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995). In Nevada, an implied covenant of  
 4 good faith and fair dealing exists in every contract, *Consol. Generator-Nevada v. Cummins*  
 5 *Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998), and a plaintiff may assert a claim for its  
 6 breach if the defendant deliberately contravenes the intention and spirit of the agreement,  
 7 *Morris v. Bank Am. Nev.*, 886 P.2d 454 (Nev. 1994). The covenant of good faith and fair  
 8 dealing "only applies after a binding contract is formed." *Crellin Techs., Inc. v. Equipmentlease*  
 9 *Corp.*, 18 F.3d 1, 10 (1st Cir. 1994).

10 Plaintiff alleges that Defendants breached the duty of good faith and fair dealing by  
 11 initiating a foreclosure on the Property without a right to do so. (Complaint 9:1-16, ECF No. 1.)  
 12 However, the Defendants have shown a valid chain of title and Plaintiff does not dispute that  
 13 she ceased making payments on her mortgage. *See* (Complaint, ECF No. 1; Deed of Trust, ECF  
 14 No. 13-2; Assignment of Deed of Trust, ECF No. 13-4; Notice of Default, ECF No. 13-7.)  
 15 Therefore, Defendants had a right to foreclose under the Deed of Trust, and their foreclosure  
 16 was not a breach of the implied covenant of good faith and fair dealing. *See Davenport v. Litton*  
 17 *Loan Servicing, LP*, 725 F. Supp. 2d 862, 884 (N.D. Cal. 2010) ("As a general matter, a court  
 18 should not conclude that a foreclosure conducted in accordance with the terms of a deed of trust  
 19 constitutes a breach of the implied covenant of good faith and fair dealing.") (internal quotation  
 20 marks and citations omitted).

#### 21 **E. Leave to Amend**

22 Generally, if the Court grants a motion to dismiss, it must then decide whether to grant  
 23 leave to amend. The court should "freely give" leave to amend when there is no "undue delay,  
 24 bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party  
 25 by virtue of . . . the amendment, [or] futility of the amendment . . . ." Fed. R. Civ. P. 15(a);




1 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is  
2 clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v.*  
3 *Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

4 Granting Plaintiff additional time to amend her Complaint would be futile and cause  
5 undue delay and prejudice to the Defendants by further prolonging this suit. Plaintiff has not  
6 sought leave to amend her Complaint, nor did she allege additional facts supporting her  
7 Complaint in her Response. Additionally, Plaintiff has already challenged Defendants' right to  
8 foreclose on the Property in state court, where her claims were dismissed without prejudice.  
9 Furthermore, Plaintiff lacks standing to even bring her underlying fraud claim based on the  
10 securitization and pooling of her mortgage. Pleading more specific facts concerning the time,  
11 place, or content of the alleged fraud would still be insufficient to assert a claim for which relief  
12 can be granted. Therefore, allowing Plaintiff additional time to amend her Complaint would  
13 serve no purpose but to further prolong this proceeding and delay Defendants from exercising  
14 their legal rights.

15 **IV. CONCLUSION**

16 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (ECF No. 11) is  
17 **GRANTED**. All of Plaintiff's claims are dismissed with prejudice. The Clerk shall enter  
18 judgment accordingly.

19 **DATED** this 18th day of July, 2014.

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23 Gloria M. Navarro, Chief Judge  
24 United States District Judge  
25